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No. 08-

IN THE

# Supreme Court of the United States

THE COALITION OF WATERSHED TOWNS,
THE TOWN OF HUNTER, NEW YORK,
THE TOWN OF ROXBURY, NEW YORK, and
THE TOWN OF HAMDEN, NEW YORK,

*Petitioners,*

*v.*

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE NEW YORK STATE DEPARTMENT OF HEALTH, RICHARD M. DAINES, M.D., AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH, and THE CITY OF NEW YORK,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did Congress create a "procedural right" for litigants to challenge final EPA actions made under the Safe Drinking Water Act ("SDWA")(42 U.S.C. Chapter 6A 300f *et seq.*) without having to meet all the normal standards for redressability, through 42 U.S.C. §300j-7(a)(2)?

2. Do the EPA's two contested actions and proffered interpretation that the SDWA and its implementing regulations do not contain any language controlling the manner by which EPA's determinations concerning revisions to previously approved and conveyed state "primacy" for SDWA programs may be modified or altered by the EPA, directly conflict with the plain language in 42 U.S.C. §300g-2(b)(1)-(c) and its implementing regulations, and Congress' legislative intent that the SDWA and its provisions be primarily a state and locally run program?

3. Did the Court of Appeals' creation of a new affirmative obligation, requiring Petitioners show a different subsequent outcome if the EPA actions were annulled and the State was vested with "primacy" over the Catskill/Delaware water systems as of May 15, 2007, improperly enlarge the standard for redressability for Article III standing in direct contravention of *Lujan v. Defenders of Wildlife* (504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 352 [1992]) and its progeny cases?

## LIST OF PARTIES

The Petitioners Coalition of Watershed Towns, the Town of Hunter, New York, the Town of Hamden, New York, and the Town of Roxbury, New York, (hereinafter "Petitioners" or "Coalition") commenced two proceedings by two separate Petitions for Review pursuant to 42 U.S.C. §300j-7(a)(2): the first proceeding with Docket No. 07-2449-ag (L) involves the United States Environmental Protection Agency ("EPA") as Respondent, and the New York State Department of Health ("DOH"), and Richard F. Daines, M.D., as Commissioner of the New York State Department of Health (Commissioner and DOH collectively referred to as "DOH" or "State"), as Intervenor-Respondents; and the second proceeding with Docket No. 07-3912-ag (Con), involves the EPA as Respondent, and includes the DOH and the City of New York ("City") as Intervenor-Respondents. The foregoing parties are the parties from below. In addition, Natural Resources Defense Council, Inc., appeared as amicus curiae and argued in support of the EPA, DOH and the City.

## CORPORATE DISCLOSURE STATEMENT

The Petitioner Coalition of Watershed Towns is an intermunicipal body created under New York State Law by municipalities located within New York City's Watershed, west of the Hudson River. The Coalition of Watershed Towns does not have any parent corporation and is not a publically held corporation.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Coalition of Watershed Towns v. U.S. E.P.A.*, 552 F.3d 216 (C.A.2 2008). *See* Appendix A ("App."). There were no administrative proceedings or other court orders.

## STATEMENT OF JURISDICTION

The Petitioners filed a Petition for Review dated June 8, 2007, challenging final EPA action made on April 25, 2007, and then filed a Petition for Review dated September 11, 2007 challenging a related July 30, 2007 final EPA action. The petitions were filed with the Court of Appeals, Second Circuit, pursuant to 42 U.S.C. §300j-7(a)(2). That statute confers original jurisdiction to review EPA actions made under the Safe Drinking Water Act upon the Circuit Court of Appeals where the Petitioners' are located or affected.

The Court of Appeals informally consolidated the two proceedings. The court issued a Per Curium opinion for the two proceedings and Judgment was entered on December 29, 2008. App. A. The Court of Appeals subsequently denied Petitioners' Petition for Rehearing En Banc, dated January 9, 2009, requesting to have the panel rehear Petitioners' Petitions for Review and also to have the Petitions reheard by the Court of Appeals en banc, by single Order issued February 20, 2009. App. C.

This Court's jurisdiction is now invoked pursuant to 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS AND REGULATIONS INVOLVED

A. Safe Drinking Water Act: 42 U.S.C. §300g-2(a), and 42 U.S.C. §300j-7(a)(2).

B. National Primary Drinking Water Regulations Implementation: 40 C.F.R. §142.2, 40 C.F.R. §142.10, 40 C.F.R. §142.11, 40 C.F.R. §142.12, 40 C.F.R. §142.13, 40 C.F.R. §142.17.

As all provisions involved are lengthy, the pertinent text is provided at Appendix D.

## STATEMENT OF THE CASE [1]

This case involves the interpretation of the federal Safe Drinking Water Act ("SDWA") and its implementing regulations, and the application of those provisions to the EPA's oversight authority over states and territories that have received "primacy" to administer and enforce SDWA programs over the nation's approximately 170,000 public drinking water systems. This case also involves the construction of 42 U.S.C. §300j-7(a)(2), and the proper standard to satisfy redressability for Article III standing for any challenge to EPA action made under the SDWA, as created by Congress in §300j-7(a)(2). By denying the Petitioners' two petitions for review of the respective EPA actions and wrongly holding that the

1. This Petition cites limited portions of the parties' Deferred Joint Appendix ("DJA"), the EPA's "Proof Brief for the Respondent" dated February 11, 2008 ("EPA Brief"), the EPA's "Sur-Reply Brief for the Respondent" dated April 22, 2008 ("EPA Sur-Brief").

Petitioners failed to establish redressability for Article III standing, the Court of Appeals wrongly decided how these provisions should be interpreted and applied. The writ of certiorari should respectfully be issued by this Court to address these important and novel questions of federal law.

### A. The Safe Drinking Water Act and Congress' Intent; and the Related EPA Regulations for "Primacy".

In 1974 Congress enacted the federal Safe Drinking Water Act (42 U.S.C. Chapter 6A 300f *et seq.*) under the federal Public Health Service Act to ensure that public water supply systems across the country meet minimum national standards for the protection of public health. As part of the SDWA, Congress required EPA to promulgate national primary drinking water regulations to, *inter alia*, restrict the concentration of specific contaminants in public water systems.[2] *See generally* 42 U.S.C. §300g-1; *see also* 42 U.S.C. §300f(1). The SDWA requires EPA to adopt maximum contaminant level goals that establish maximum contaminant levels or applicable treatment standards if the EPA determines that meeting the maximum contaminant levels is not technically or economically feasible. *See generally* 42 U.S.C. §300g-1.

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2. The statute defines "public water system" as "a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. Such term includes . . . any collection, treatment, storage, and distribution facilities . . . used primarily in connection with such system . . . ." *See* 42 U.S.C. §300f(4)(A).

Congress' intent in adopting the SDWA was to ensure that "the Act . . . be primarily a state and locally run program." *See National Wildlife Federation v. EPA*, 925 F.2d 470, 473 (C.A.D.C. 1991). In *National Wildlife Federation*, the Court of Appeals, District of Columbia, recited the legislative history of the SDWA:

> See a Legislative History of the Safe Drinking Water Act 890 (U.S.G.P.O. 1982) (remarks of Senator Hart) ("[T]he balance to be sought between the legitimate responsibility of the States to protect drinking water and *Federal backup enforcement* is a proper one. The States must assume primary responsibility for the implementation of the policies set out in this legislation. *The Federal Government obviously cannot police each and every drinking water supply system in this country.*") (emphasis added); *id.* at 649 (remarks of Representative Nelson); *id.* at 553 (H.R. Rep. No. 1185, 93rd Cong., 2d Sess., U.S. Code Cong. & Admin. News 1974, 6454.

925 F.2d at 474 fn1 (emphasis same). As such, Congress intended that public health and safety under the SDWA be the "primary responsibility [of the states] for the implementation of the policies set out in th[at] legislation." In furtherance of its intent, Congress adopted 42 U.S.C. §300g-2.

The purpose of 42 U.S.C. §300g-2 is to provide for the states—not the EPA—to maintain "primary

enforcement responsibility for public water systems[.]"[3] *See* 42 U.S.C. §300g-2(a). The statute its titled "State primary enforcement responsibility," and directs that the EPA "shall," *inter alia*, adopt regulations governing the manner in which states obtain a "determination" from EPA for state primacy of SDWA regulatory programs for public water systems: EPA must adopt regulations governing "the manner in which the determination is made, the period for which the determination will be effective, and the manner in which the [EPA] may determine that such requirements are no longer met." *See* 42 U.S.C. §300g-2(b)(1). The statute further requires that EPA adopt regulations providing for notice and public hearing before EPA can issue a "determination" that a state no longer meets the requirements for primacy over a SDWA regulatory program. *Id.* The statute requires EPA to treat a state's request to revise its previously approved regulatory program to incorporate "each new or revised . . . drinking water regulation," in the same manner and effect as the EPA treats a State's application for initial primacy approval for SDWA regulatory programs. *See* 42 U.S.C. §300g-2(c). The EPA complied, in part, with Congress' directives in 42 U.S.C. §300g-2 to adopt maximum contaminant level goals and national primary drinking water regulations through the EPA's regulations at 40 C.F.R. Part 141; and, to ensure State primacy of those provisions, the EPA promulgated its

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3. Under 42 U.S.C. §300g-2, a state may obtain primary responsibility for administering and enforcing EPA SDWA standards, including the "SWTR" (discussed below). This primary administrative and enforcement authority is hereinafter referred to as "primacy".

National Primary Drinking Water Regulations Implementation General Provisions, set for at 40 C.F.R. Part 142 *et seq.*, subparts A-B.

Part 142, section 142.11, provides the procedures for EPA to make the "[i]nitial determination of primary enforcement responsibility" for a State to have primacy of a SDWA program. That section provides that "[a] State may apply to the Administrator for a determination that the State has primary enforcement responsibility for public water systems in the State pursuant to section 1413 of the Act" (*i.e.*, 42 U.S.C. §300g-2). *See* 40 C.F.R. §142.11(a); *see also* 40 C.F.R. §142.2 (defining "Act" as "Public Health Service Act"). However, as contemplated by 42 U.S.C. §300g-1 and §300g-2(c), the EPA is required to adopt new or revised national primary drinking water regulations from time to time. The EPA's regulations provide the procedures governing any "[r]evision of State programs" (title), and direct that "[t]o retain primary enforcement responsibility, States must adopt all new and revised national primary drinking water regulations[.]" *See* 40 C.F.R. §142.12(a). As such, States are required to regularly revise their initial programs to retain primacy of previously approved SDWA programs.

The revision provisions under §142.12 are clear that when a State seeks primacy for "new and revised national primary drinking water regulations," the State is merely revising its initial "approved State primary program[.]" *See* 40 C.F.R. §142.12(a). Section 142.12 identifies a State application for new or revised national primary drinking water regulation as an "update [to] the approved State primacy program[.]" *See* 40 C.F.R.

§142.12(c)(1)(i). A revision approval under §142.12 becomes part of the prior initial primacy approval obtained under §142.11: the regulations define "[a]pproved State primacy program" as all elements of a program that were approved by the EPA for the State's initial application for primacy, as well as "all State program revisions" that were subsequently approved by the EPA.[4] *See* 40 C.F.R. §142.2.

The regulations dictate that, for either an initial primacy determination under "§142.11" or a revision to an approved state primacy program under "§142.12," a "State has primary enforcement responsibility for public water systems in the State during any period for which the Administrator determines" that the state is in compliance with 40 C.F.R. §142.10. *See* 40 C.F.R. §142.10; *see also* 42 U.S.C. §300g-2(a). As any approval of a state application for new or revised national primary drinking water regulation reverts in to the state's initial approved primacy program (the definition of "[a]pproved State primacy program" includes the initial and revised primacy approvals) both the initial approval and later program revision approvals "shall continue in effect unless terminated pursuant to [40 C.F.R.] §142.17." *See* 40 C.F.R. §142.11(b)(3).

The regulations dictate that for either initial (§142.11) or new/revision approvals (§142.12), the EPA's "determination" on requests for approvals must take affect in accordance with notice and public hearing

4. States are afforded "[i]nterim primary enforcement authority" when they apply for primacy for a new or revised national drinking water regulation. *See* §142.12(e)

requirements in 40 C.F.R. §142.13. *See* 40 C.F.R. §142.13(a), 40 C.F.R. §142.11(b)(2), 40 C.F.R. §142.12 (d)(3)(iii). Most important, whenever the EPA "determines that a State no longer meets the requirements set forth in 40 CFR part 142, subpart B," including for initial program approvals (§142.11) or new/ revised program approvals (§142.12), the EPA must comply with the procedures in 40 C.F.R. §142.17 before it can take action. *See* 40 C.F.R. §142.17(a)(2). In other words, whenever the EPA believes "a State no longer meets the requirements" in the SDWA or its regulations, the EPA must first follow the procedures in §142.17 before it can modify or withdraw previously given approvals.

**B. The Surface Water Treatment Rule And The City's Efforts To Avoid Filtration.**

In 1986, Congress concluded that the SDWA had not adequately achieved its intended public health and safety goals. *See* S. Rep. No. 99-56, at 2 (1985), reprinted in 1986 U.S.C.C.A.N. 1566, 1567. At that time Congress amended the SDWA to require all public water systems providing drinking water through a reservoir to install a treatment known as filtration. In 1989, EPA fulfilled this requirement when it adopted the Surface Water Treatment Rule ("SWTR"), set forth at 40 C.F.R. Part 141, subpart H. *See* 54 Fed. Reg. 27527 (June 29, 1989). The SWTR was included with the existing national primary drinking water regulations promulgated at 40 C.F.R. Part 141.

The purpose of the SWTR is to reduce the contamination of drinking water by microbial pathogens.

*See generally* 40 C.F.R. §141.70, §141.71, §141.171. The SWTR requires public water systems supplied by surface water to either install and operate water filtration processes that achieve specific levels of microbial control, or alternatively to satisfy various water quality, operational and watershed control criteria for avoiding filtration. *See* 40 C.F.R. §141.70; *see also* 40 C.F.R. §141.70(b)(1), §141.71. To satisfy the alternate water quality, operation and watershed control criteria the water provider must establish a water quality protection program sufficient to assure the same level of water quality for the water supply without filtration. *See* 40 C.F.R. §141.71. That provision is known as a "Filtration Avoidance Determination" or "FAD." If, at any time, a public water system fails to meet the filtration avoidance criteria, it may be required to provide filtration of its surface water source. *See* 40 C.F.R. §141.71.

New York City sells water to approximately 9,000,000 people in the City's metropolitan and surrounding areas. (DJA A340) (*see also* fn 12 *infra*) The source of the City's public water supply is comprised of three surface water systems: the Croton, the Catskill and the Delaware (collectively referred to herein as the "Watershed"). (*Id.* at A340-341) Ninety (90%) percent of that water comes from the West-of-Hudson Watershed from the Catskill and Delaware systems ("Catskill/Delaware systems"). The City's Watershed (approximately 2000 square miles) is larger than the State of Rhode Island. The City's West-of-Hudson Catskill/Delaware watershed consists of parts of the Sullivan, Greene, Ulster, Schoharie and Delaware County, and includes all or portion of 50 towns and villages. (*Id.*) Those towns,

villages and counties, including Petitioners, are members of the Coalition.

The City's public water system is subject to the SWTR; the City must either provide filtration of its surface water sources or obtain a FAD from EPA. (*See also* DJA A342, DJA A399-400) In the East-of-Hudson (*i.e.*, for 10% of the City's water supply), the City agreed to filter its water. After the City concluded that it would cost several billion dollars to construct a filtration plant to filter the City's Catskill/Delaware watershed and over several hundred million dollars each year to operate it, the City sought to avoid filtration and submitted a proposed filtration avoidance program to EPA.

The EPA issued two limited conditional FADs for the City's Catskill/Delaware systems in the early 1990s. The EPA limited its FADs because of concerns with the City's ability to control activities in its Watershed that could adversely affect water quality. As such, as a condition to obtaining its FAD, the City agreed to, *inter alia*, implement strict land-use and wastewater treatment regulations within its Watershed under New York State Public Health Law ("PHL") Article 11, which requires the DOH to approve all extraterritorial regulations proposed by the City regarding its Watershed, to alleviate certain EPA concerns.

To fulfill its requirements under PHL, the City proposed an initial set of regulations in 1990 to regulate activities in the Watershed. These regulations were widely criticized and opposed by communities in the Watershed. In fact, the Coalition was formed by the Catskill/Delaware municipalities to represent

the collective interests of the Catskill/Delaware communities, and to insure that any City proposed watershed protection program reflected only those measures proven necessary to protect water quality without unfairly burdening the Watershed communities. The City's watershed protection efforts also generated multiple legal actions involving a variety of issues concerning, *inter alia*, filtration avoidance authority and the City's watershed protection efforts. These proceedings collectively involved the State, the City, the Coalition and its member municipalities. (*See e.g.*, DJA A284); *see also City of New York v. New York State Dept. of Health*, 164 Misc.2d 247 (S.Ct. Albany Co. 1995); *see also Coalition of Watershed Towns v. William K. Reilly, et al.*, Civil Action No. 92-CV-0198 (N.D.N.Y. 1992).

A primary issue raised by Catskill/Delaware communities at the outset of the City's filtration avoidance efforts was the EPA and State's failure to follow the procedures under the SDWA and its implementing regulations for approving and conveying primacy for the SWTR. Before the EPA issued its limited FADs in the early 1990s, the DOH, believing it had primacy for the then recently adopted SWTR, issued the City a conditional FAD for the Catskill/Delaware systems in 1991. (E.g., DJA A26-27) As stated above, the Coalition and Watershed communities had significant concerns with the City's proposed watershed protection efforts and regulations. The Coalition and several individual Watershed communities commenced legal action against the EPA, State and City, contesting the State's failure to properly apply for, receive EPA approval, and obtain primacy for the SWTR, including

failing to comply with the notice and public hearing provisions. *See Coalition of Watershed Towns v. William K. Reilly, et al.*, Civil Action No. 92-CV-0198 (N.D.N.Y. 1992); (*see also e.g.*, DJA A26-27). These communities pursued the State and EPA's primacy procedure failures to protect their rights as it was the only remaining means of having the respective governmental agencies listen to their concerns. The Watershed communities' actions effectively resulted in the EPA and State acknowledging the failure to adhere to primacy procedures for the SWTR, and withdrawing the DOH issued FAD in 1992. (DJA A26)

### C. The MOA

Eventually, representatives of the New York State Governor's office and New York City entered in to negotiations with EPA, the DOH, the New York State Department of Environment of Conservation ("DEC"), the upstate communities, and several environmental groups, to endeavor to develop a comprehensive and amicable Watershed protection program. Those negotiations resulted in the historic 1997 New York City Watershed Memorandum of Agreement ("MOA"), which was signed in 1997 by representatives of New York State, DOH, the City, EPA, the Coalition of Watershed Towns, the Catskill Watershed Corporation, Delaware County, the Towns of Roxbury, Hamden, Hunter, and approximately 50 other watershed municipalities, and certain environmental groups. (*See* DJA A141, A293-297)

The MOA was a collaborative effort to achieve a sustainable balance of "drinking water protection and economic vitality within Watershed communities[.]" (DJA A149). The MOA was a comprehensive agreement to allow the City to implement a meaningful Watershed protection program that also served to maintain and enhance the economic vitality and social character of the Watershed communities. (*Id.* at A150) The primary element of the City's Watershed protection program agreed to in the MOA and needed to avoid filtration under the SWTR was the "NYC Watershed Land Acquisition Program" (herein after referred to as the "**1997 LAP**"). (*See Id.* at A155- Article II) The 1997 LAP authorized the City, subject to certain conditions, to purchase lands and easements in specified areas of the City's Catskill/Delaware watershed for the purpose of water supply protection. However, the MOA limited the total amount of monies the City could expend on land acquisition under the 1997 LAP to $300 million dollars.[5] (*See* DJA A155, A163 ¶74(a))

The MOA was limited to the terms "set forth in [the] Agreement[.]" (*Id.* at Whereas 7). The Watershed protection program agreed to in the MOA was **the single** $300 million 10 year land acquisition program. (DJA A163¶74(a)) The parties' collaboration and consent to the "City's land acquisition program, the City's Watershed Regulations, and the other programs and conditions contained in the [MOA]," was predicated upon

5. The MOA said the 1997 FAD would require the City to commit immediately $250 million, and after five years into the 1997 LAP, the EPA or State could require the City to commit up to an additional $50 million. (*Id.* at A163)

those MOA defined components and other MOA obligations being "implemented in conjunction with one another[.]"[6] (DJA A150 Whereas 9) As such, based upon the interdependent-components and the parties' representations in the MOA, the Coalition and individual municipalities agreed to waive their legal rights to challenge, *inter alia*, the 1997 LAP, the State's water supply permit to be issued to the City for its 1997 LAP, the City's Watershed Regulations adopted as part of the MOA, and the 1997 FAD itself. (*See* DJA A285-286) Based upon the MOA interdependent-components, the parties consented to EPA issuing the City's 1997 FAD.

**D. EPA's "Full Authorization" of DOH SWTR Primacy.**

As intended by Congress when enacting the SDWA, the State applied to the EPA in 1992 to obtain primary administrative and enforcement authority for the SWTR for all public water systems for the State; including the Catskill/Delaware water system. (*See e.g.*, DJA A1, A26) In the MOA, EPA expressly agreed to approve DOH's application for primacy in administering and enforcing the SWTR for the entire State effective immediately, with one limitation. The EPA agreed to a May 15, 2007 scheduled effective date for its approval of State primacy over the Catskill/Delaware systems. (*Id.* at A273)

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6. The EPA, City and State specifically agreed that the "[MOA] is a Legally Binding Contract. The respective commitments of the Parties in [the MOA] are in consideration of each other . . . ." (DJA A288, A149) The MOA parties further agreed that "[a]ny Municipal Party . . . or the Coalition is deemed to be an aggrieved party . . . whenever it, or one of its residents, tenants or properties, has the right to receive the benefit of a particular paragraph of [the MOA] for which the breach or violation is alleged." (DJA A288)

By final Order dated June 3, 1997 ("1997 Order"), the EPA Administrator determined to "affirm [the] determination to approve the State of New York's request to revise its Public Water Supply Supervision (PWSS) program for compliance with the National Primary Drinking Water Regulations to include the Surface Water Treatment Rule (SWTR)." (DJA A298) The EPA's 1997 Order stated that "[t]his affirmation is effective immediately for all systems in New York State, except [for the Catskill/Delaware systems] *where we are delaying the effective date of our approval[.]*" (*Id.*) (emphasis added) Consistent with the MOA, the 1997 Order notes that the State and EPA agreed "that EPA will retain SWTR primacy for New York City's Catskill and Delaware water supply systems until May 15, 2007. Therefore, EPA's approval of the State's application for SWTR primacy with respect to these systems *will become effective* on May 15, 2007." (*Id.* at A299)(emphasis added)[7] The EPA acknowledged that its June 3, 1997 primacy approval determination was the "EPA's order, referenced at 40 C.F.R. §142.13(f)[.]" (*Id.* at A298) The 1997 Order was published in the Federal Register on July 31, 1997.[8] *See* 62 Fed Reg 41049; (DJA A301)

The EPA stated in plain terms that its 1997 Order, including the approved May 15, 2007 schedule, was the EPA's "approach of 'full authorization' for primacy for the

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7. According to EPA, the delay was necessary to allow EPA to provide the "appropriate oversight" of the City's implementation of the conditions of the 1997 FAD. (DJA A299)

8. The EPA published "Notice of final action" reiterated that "primacy with respect to this system [(*i.e.*, Catskill/Delaware)] *will become* effective on May 15, 2007." (DJA A301) (emphasis added)

SWTR, but with a delayed date for New York City's Catskill and Delaware systems[.]" (DJA A299) The 1997 Order and its approved schedule was the final determination in the State's SWTR application process and was effective without any further EPA or DOH action.

### E. EPA's April 25, 2007 And July 30, 2007 Actions Harm Petitioners' Contract and Statutory Rights.

The Petitioners waived significant legal rights, including the ability to challenge the 1997 LAP and the City's Watershed Regulations, in exchange for their MOA contract right to have the State carryout SWTR primacy in the City's Catskill/Delaware watershed, and issue any FADs, as of May 15, 2007. However, in April 2007, without any prior notice to the State or public, and without conducting any hearings, the EPA sent a letter to the DOH dated April 25, 2007, announcing for the first time that the EPA had unilaterally extended the previously approved and scheduled May 15, 2007 primacy date for the Catskill/Delaware watershed. (DJA A360) The EPA admitted it rescinded the previously approved and scheduled May 15, 2007 date to "complete [its] work on the 2007 [FAD] prior to primacy transfer."[9] (DJA A361)

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9. The EPA's April 25, 2007 action was a bad faith violation of its obligations in the MOA. The EPA claimed that extending the May 15, 2007 primacy date approved in the 1997 Order was necessary because the State allegedly failed to enact "adequate administrative penalty authority under state law." (EPA Brief p. 18, 52) This is not true. The reality is that the State's alleged failure to adopt sufficient administrative penalty authority was not of "critical importance" (EPA Brief p. 19): the EPA did not

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Shortly before the April 25, 2007 determination, on April 12, 2007, EPA released a draft new 10 year FAD for the City's Catskill/Delaware systems ("draft 2007 FAD"). (DJA A354, A356) The draft 2007 FAD required a second and new $300 million 10 year land acquisition program as a condition for issuing the FAD. (DJA A357) The 2007 program was an EPA unilateral six fold increase of the approximate five year $53 million land acquisition program proposed by the City just four months earlier in its December 2006 application for a new FAD (DJA A350) The EPA, State and City did not include the Petitioners in any negotiations leading to the EPA's draft 2007 FAD; there was no MOA for the draft 2007 FAD.

The Petitioners' MOA entitlement to have the State act with primacy as of May 15, 2007 clearly included the right to have the State issue any FADs for the Catskill/ Delaware systems after May 15, 2007—not the EPA.

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(Cont'd)

take any action against the State to withdraw its previously approved primacy determination for approximately 9-10 years (*see* EPA Brief 18-19, 53 [authority was first required in 1998]); and never said in its correspondence to the State that it would extend the May 15, 2007 primacy date for failure to adopt the penalty authority before April 25, 2007. (*E.g.*, DJA A328, A352) **Most importantly**, the 1997 Order granted the State "'full authorization' for primacy for the SWTR" over all other public surface water systems for the State. (DJA A299) The City of Syracuse area, which had a FAD for its public water system serving 147,000 people (that was extended through 2004), is a public water system under the SWTR. *See* fn 12 *infra*. The EPA did not take any action concerning the State's failure to enact that same penalty authority for the remaining public water systems overseen by the State, including over Syracuse. (DJA A361)

However, on July 30, 2007, the EPA issued the "Final New York City Filtration Avoidance Determination" ("2007 FAD") under the auspices of having SWTR jurisdiction over the City's Catskill/Delaware watershed. (DJAA392) The 2007 FAD promulgated the City's required watershed protection program to obtain the 2007 FAD, and included the same exact land acquisition program articulated in the draft 2007 FAD, including the $300 million land acquisition fund ("2007 LAP"). (*Id.* (§4.2))

The Petitioners' primary concerns with both the EPA's April 25, 2007 and July 30, 2007 actions are the potential adverse economic and community character impacts from the 2007 LAP. The Watershed communities' goals and concerns regarding any City land acquisition program were reiterated in the MOA:

> [to] allow existing development to continue and future growth to occur in a manner that is consistent with the existing community character and planning goals of each of the Watershed communities; and . . . insure that the availability of developable land in the Watershed will remain sufficient to accommodate projected growth . . . and without substantially changing future population patterns in the Watershed communities.

(DJA A150) After the draft 2007 FAD was released, the Petitioners implored that "the EPA cannot double the City's land acquisition goals without conducting an evaluation to determine whether this new land

acquisition program together with the City Watershed Regulations" would still comport with these communities' goals of maintaining and expanding existing development and growth, consistent with existing community character and planning goals.[10] (DJA A381)

The record submitted by the EPA to the Court of Appeals shows EPA never performed any actual analyses or meaningful evaluation of the **potential** adverse social, economic or community character impacts of requiring the City to acquire $241 million more of the natural land resources in Petitioners' economically depressed communities; there was no review to determine whether there will remain sufficient developable land with access to municipal infrastructure for commercial, residential and/or industrial development (*i.e.*, for job creation, generating sales, business, commercial, and/or industrial tax revenues, and to promote and support population growth) in these communities after the 2007 LAP. The EPA's determination to ignore these concerns and perform this review highlights the reason it was so important to Petitioners' communities that the State have primacy effective May 15, 2007. EPA has stated in this proceeding that it does not have to consider the impacts of the City's water quality protection programs on the upstate communities under the SDWA, claiming that the SDWA provisions at issue are not intended to protect

10. The record below contains ample evidence of these significant adverse economic impacts and potential adverse economic and community character impacts. *See e.g.*, Reply Brief for Petitioners, dated April 4, 2008 (summarizing evidence in record). This evidence is not articulated in this Petition.

those communities. Regardless of whether that is a legally correct position, New York State Law is very clear – DOH's FAD decision, and any primacy action, would be subject to the New York State Environmental Quality Review Act ("SEQRA") (Environmental Conservation Law ["ECL"]) Article 8, 6 NYCRR Part 617 *et seq.*).

SEQRA's directive "is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time." 6 NYCRR §617.1(c); ECL §8-0109. Any SEQRA review of the potential environmental impacts for a proposed action includes identifying and considering significant potential social, economic and community character impacts. *See* 6 NYCRR §617.1(d). The State must consider all reasonably related long-term, short-term and cumulative effects of the proposed action with these environmental criteria. *See* 6 NYCRR §617.7(c)(2). Relative to the 2007 FAD, SEQRA would mandate that the State prepare a full environmental impact statement and identify and consider the **potential** significant adverse community character, social and economic impacts of issuing a FAD for the Catskill/Delaware System after May 15, 2007[11] (including all reasonably related long-term, short-term, and cumulative effects). *See* 6 NYCRR §617.2(b), §617.4(b)(1), (b)(4), (b)(6), (b)(8)-(11). The State's SEQRA review would be more stringent, in-depth, and action

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11. The SEQRA review process would require public hearings and comments on the proposed FAD before acting, and require that any possible alternatives and reasonable mitigation of impacts be identified, discussed and addressed by the State for the FAD. *See* 6 NYCRR §617.9, §617.7.

forcing than any EPA review could be: "SEQRA is not merely a disclosure statute; it imposes far more action-forcing or substantive requirements on state and local decision makers than NEPA imposes on their federal counterparts[.]" *Jackson v. New York State Urban Develp. Corp.*, 67 NY2d 400, 434 (1996)(internal quotations omitted).

### F. The EPA's Actions and Interpretation of the SDWA Have Broad National Implications.

The EPA's April 25, 2007 and July 30, 2007 actions each deprived Petitioners' MOA rights and State law entitlement to a State conducted SEQRA review of any primacy "action," including issuing the 2007 FAD, after May 15, 2007. The Petitioners challenged the EPA's actions pursuant to 42 U.S.C. §300j-7(a)(2), to protect their MOA contract and state law rights. The Petitioners' primary arguments were that the EPA's April 25, 2007 action was arbitrary and illegal because it had the effect of withdrawing previously approved and scheduled primacy from DOH without following the procedures required by 42 U.S.C. §300g-2(b)(1), 40 C.F.R. §142.17(a)(2)-(4), and 40 C.F.R. §142.13; and, based upon its improper withdrawal of primacy over the Catskill/Delaware systems, that the EPA's subsequent July 30, 2007 action was *per se* invalid because the EPA did not have SWTR jurisdiction to issue the 2007 FAD. In opposition, asserted for the first time ever in its sur-reply, the EPA proffered its interpretation of the SDWA and related regulations for its actions, arbitrarily claiming that these provisions "do[ ] not contain any language controlling the manner by which EPA's determinations concerning revisions to primacy programs—such as the EPA's June 1997 determination

. . .–may be modified," and that there is "no such procedural restriction on EPA's revision determinations[.]" (EPA Sur-Brief p. 24) These specific EPA actions and proffered interpretations, while personally harming Petitioners, have far broader national implications.

New York City, providing drinking water to 9,000,000 people, is just one of five larger metropolitan areas in the United States that has obtained a FAD for its public water systems under the SWTR: San Francisco, California, with a FAD, serves a population of 2,100,000 (watershed size 459 sq. miles); Seattle, Washington, with a FAD, serves a population of 1,200,000 (watershed size 141 sq. miles); Portland, Oregon, with a FAD, serves a population of 800,000 (watershed size 102 sq. miles); and the Boston, Massachusetts metropolitan area, with a FAD, serves a population of 1,932,000 (watershed size 300 sq. miles).[12] Together, these FADs alone provide water to about 15,000,000 people across the Country.

Additionally, according to the EPA, as of 2004, there were more than 170,000 public water systems providing

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12. *See* New York City Department of Environmental Protection Final Supplemental Environmental Impact Statement For the Croton Water Treatment Plant, section 2.3.4.1, Table 2-1, available at *http://www.nyc.gov/html/dep/pdf/croton/2purpose.pdf.* (noting that the information from taken from the EPA, USEPA. 1999. Protecting Sources of Drinking Water: Selected Case Studies in Watershed Management. EPA 816-R-98-019). Pursuant to Federal Rules of Evidence 201(b), this Court can take judicial notice of the above information as it constitutes facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

drinking water to people across the United States.[13] By 2004, all states and territories in the United States, except Wyoming and the District of Columbia, had obtained primacy to administer and enforce SDWA programs for these public water systems.[14] As contemplated by 42 U.S.C. §300g-1 and §300g-2(c), the EPA must continue to adopt new or revised national primary drinking water regulations to address new or continuing safe drinking water concerns for these approximately 170,000 public water systems. The states and territories are obligated to continually revise their existing primacy programs to include those new/revised regulations "[t]o retain primary enforcement responsibility" for these 170,000 public water systems. *See* 40 C.F.R. §142.12.

Presently, in order to have included new or revised EPA national primacy drinking water regulations like the SWTR, *every* initially approved state and territory primacy program has clearly been revised since the SDWA in 1974. The EPA's arbitrary interpretation of the SDWA and its regulations, constituting the legal justification for the EPA's illegal actions here, improperly purports to give the EPA unfettered authority to unilaterally take any action that has the effect of withdrawing prior approved and conveyed primacy authority over all public water systems across the county, beyond just improperly empowering the EPA

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13. *See* EPA's "Understanding the Safe Drinking Water Act," EPA 816-F-04-030 June 2004, available at *http://www.epa.gov/safewater/sdwa/30th/factsheets/pdfs/fs_30ann_sdwa_web.pdf*. *See also* fn 12 *supra*.

14. *See* fn 13 *supra*.

to randomly assert control over FADs serving at least 15,000,000 people, as it did for the City's Catskill/ Delaware systems.

**G. The Lower Court's Opinion.**

By Per Curiam panel Opinion (before Feinberg, Cabranes, and Wesley, Circuit Judges) issued December 29, 2008 ("Opinion"), the Court of Appeals, Second Circuit, wrongly denied the Coalitions' two petitions for review of the respective EPA actions. *See Coalition of Watershed Towns v. U.S. E.P.A.*, 552 F.3d 216, 218 (C.A.2 2008).

In its Opinion, the panel acknowledged that Petitioners' alleged injuries were a "breach of the Memorandum of Agreement signed by the parties in 1997 . . . which scheduled the transfer of primacy for May 15, 2007" (*Coalition*, 552 F.3d at 218), and the "loss of an opportunity to have the State conduct a cost-benefit analysis that would weigh the City's land acquisition against the preservation of local 'community character,' pursuant to [SEQRA.]" (*Id.*). The panel then assumed these injuries to be true. *See Id.* The panel's findings that Petitioners' alleged injuries of breach of the MOA agreed and "scheduled . . . transfer of primacy," and the lost right to have the State conduct a SEQRA review of the 2007 FAD, clearly established that Petitioners' requested relief annulling the EPA's actions and "hold[ing] that the EPA was required by the MOA to transfer primacy to the State in May 2007, as opposed to September 2007" (*Coalition*, 552 F.3d at p. 4), would "likely" redress the Petitioners' injuries of lost contract right to State primacy, lost right to have the State issue

any FADs after May 15, 2007, and related right to the SEQRA review.[15] However, after acknowledging what Petitioners' requested relief was, the panel wrongly created a new and additional obligation that Petitioners **further** show a different outcome if their MOA injuries were remedied and the State was the entity issuing the FAD: the panel held Petitioners failed to show that they would be in a "different position than they are now," because the panel concluded that if the State had primacy and issued the 2007 FAD, that the Petitioners did not show that "the State's analysis [of the 2007 FAD] would have substantially differed from the EPA's[.]"[16] *See Coalition*, 552 F.3d at p. 4.

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15. If the Court of Appeals had annulled the EPA' actions and required EPA to follow the proper procedures to take the State's primacy away, the EPA would have reconsidered its decision to informally withdraw primacy and issue the 2007 FAD. The EPA is clear that "[a] withdrawal of primacy is both program-wide and state-wide[.]" (EPA Brief p. 14) In fact, "[w]ithdrawal of a State primacy program is a serious sanction that applies to the entire drinking water program . . . ." (EPA Brief p. 52) Further, "[u]nder the EPA's regulations, such a sanction would only apply to a program that has failed to meet federal drinking water requirements and that cannot be corrected." (EPA Brief p. 52) The EPA also stated that "[o]n September 26, 2007, EPA made the transfer of primacy to the State under the SWTR immediately effective for the Catskill/Delaware System." (EPA Brief p. 6, fn 1) Therefore, besides the EPA's admitted reluctance to withdraw primacy from the State if the court annulled the EPA's actions, the State already has primacy; the EPA therefore has no reason to administer the SWTR in the Catskill/Delaware system, or to issue the 2007 FAD—the State would do it.

16. Petitioners would have been in a "different position than they are now" if the panel held that the State had primacy as of May 15, 2007, as the State would have been required to perform a SEQRA "analysis" of the 2007 FAD—the EPA did not.

The panel's determination that Petitioners' did not establish redressability and its creation of a new standard requiring Petitioners show that the State would have acted differently if EPA's actions were annulled, contravene the "procedural right" that Congress accorded Petitioners under 42 U.S.C. §300j-7(a)(2) to challenge these EPA actions under the SDWA. The panel's holding also ignored EPA's spurious interpretations of the SDWA and its implementing regulations (arbitrarily claiming these provisions "do[ ] not contain any language controlling the manner by which EPA's determinations concerning revisions to primacy programs—such as the EPA's June 1997 determination . . . –may be modified" [EPA Sur-Brief p. 24]), if annulled, satisfied Petitioners redressability based upon their MOA rights to State primacy authority to issue all FADs as of May 15, 2007. The panel's opinion also improperly created a new additional burden to meet the redressability showing for Article III standing, directly contravening this Court's decisions in *Lujan v. Defenders of Wildlife*, and the more recent *Sprint Communications Co., L.P., v. APCC Services, Inc.* The writ for certiorari should respectfully be granted as this matter involves important and novel questions of federal law that were wrongly decided below and should be addressed by this Court.

## REASONS FOR GRANTING THE PETITION

### I. Review Is Necessary To Resolve Whether Congress Created A Procedural Right Through 42 U.S.C. §300j-7(a)(2) To Challenge EPA Action Under The SDWA.

The writ should respectfully be granted as the Court of Appeals wrongly decided an important question of federal law concerning whether Congress created a "procedural right" for Petitioners to challenge EPA SDWA actions "without meeting all the normal standards for redressability," in 42 U.S.C. §300j-7(a)(2).

Congress created a specific means to obtain judicial review of any final action of the EPA Administrator made under the SDWA, through 42 U.S.C. §300j-7(a)(2). That provision states:

> "A petition for review of . . . any other final action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action."

42 U.S.C. §300j-7(a)(2). This Court has acknowledged that, when interpreting other similarly worded federal statutes, this language provides a "procedural right" for litigants to protect their concrete interests without having to meet all the normal standards for redressability and immediacy for Article III standing.

In *Massachusetts v. Environmental Protection Agency* ("*Massachusetts v. EPA*"), this Court reiterated the standard most preeminently summarized in *Lujan v. Defenders of Wildlife* (504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 352 [1992]) for Article III standing:

> "To ensure the proper adversarial presentation, *Lujan* holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury."

549 U.S. 497, 127 S.Ct. 1438, 1453, 167 L.Ed.2d 248 (2007), *citing Lujan*, 504 U.S. at 560-561, 112 S.Ct. 2130. However, the Court prefaced its standing inquiry by first looking to determine if Congress had created a "procedural right" to challenge the agency action at issue. *See Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct., at 1453. The Court explained that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *See Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. at 1453. The Court characterized Congress' utilization of these powers as creating a "procedural right[.]" *Id.* When a statute "'identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit,'" Congress has exercised these powers and created a "procedural right" to challenge certain agency action. *See Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct., at 1453. The Court highlighted that when Congress has created a "procedural right" to challenge agency action,

[t]hat authorization is of critical importance to the standing inquiry[.]" *See Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct., at 1453.

The Court then expounded that, regardless of the general showing for redressability, "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests," such as a statutory right to challenge agency action, that litigant "'can assert that right without meeting all the normal standards for redressability[.]" *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. at 1453, *quoting and citing Lujan*, 504 U.S. at 572, n. 7, 112 S.Ct. 2130. The Court explained that for any redressability inquiry, "[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct., at 1453, *quoting and citing Lujan*, 504 U.S. at 572, n. 7, 112 S.Ct. 213.

The Court's finding of the existence of a "procedural right" in *Massachusetts v. EPA*, was predicated largely on its reasoning in *Lujan v. Defenders of WildLife*. In *Lujan*, the Court explained the nature and implication of a Congressionally provided "procedural right" to challenge agency action: "There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." 504 U.S., at 572, n. 7,

112 S.Ct. 213. The Court provided the following as an example in *Lujan*:

> "Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years."

504 U.S., at 572, n. 7, 112 S.Ct. 213. In other words, as quoted by this Court in *Massachusetts v. EPA*, if a "procedural right" to challenge agency action exists, "'[a] litigant who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to that the procedural step was connected to the substantial result.'" 549 U.S. 497, 127 S.Ct. at 1453, *quoting Sugar Cane Growers Cooperative of Fla., v. Veneman*, 289 F.3d 89, 94-95 (C.A.D.C. 2002).

Here, the petitions for review were each submitted in "accord[ance with the] procedural right to protect [Petitioners'] concrete interests" provided by Congress through 42 U.S.C. §300j-7(a)(2), to challenge *any* EPA action made under the SDWA. That statute provides a procedure for judicial review of "any other final action of the Administrator under this chapter" (*i.e.*, the SDWA), in the "circuit in which the petitioner resides

or transacts business which is directly affected by the action." *See* 42 U.S.C. §300j-7(a)(2). In *Massachusetts v. EPA*, the Court determined that the language employed in 42 U.S.C. §7607(b)(1) created a "procedural right." 549 U.S. 497, 127 S.Ct., at 1453. That statute states:

> "*A petition for review of action of the Administrator* in promulgating any national ... or *final action taken, by the Administrator under this chapter* may be filed only in the United States Court of Appeals for the District of Columbia. *A petition for review of* the Administrator's action in approving or promulgating any . . . *or any other final action of the Administrator under this chapter . . . which is locally or regionally applicable* may be filed only in the United States Court of Appeals for the appropriate circuit."

42 U.S.C. §7607(b)(1)(emphasis added). Similar to the language employed in 42 U.S.C. §7607(b)(1), here 42 U.S.C. §300j-7(a)(2) then clearly similarly provides people with a "procedural right" to challenge "any other final action of the Administrator under this chapter [(*i.e.*, the SDWA).]"

The Coalition, its member municipalities, and all the lands subject to acquisition in the 2007 LAP, are governed and affected by the 2007 FAD: the Coalition and its communities are not "living adjacent to the site for proposed construction of a federally licensed" facility

– *they are living in the site.*[17] Because "Congress has . . . recognized a concomitant procedural right to challenge" the EPA actions through 42 U.S.C. §300j-7(a)(2), the petition for a writ of certiorari should respectfully be granted because the Court of Appeals' Opinion wrongfully ignores the application of the "procedural right" analysis to 42 U.S.C. §300j-7(a)(2), as articulated by this Court in *Massachusetts v. EPA*, and improperly denied Petitioners right to challenge the EPA's actions. The question of whether 42 U.S.C. §300j-7(a)(2) creates a "procedural right" is a novel and important question of Federal statutory construction that should respectfully be settled by the Supreme Court.

## II. Review Is Necessary To Resolve The Extent Of EPA's Authority Over The Nation's Public Water Systems Under The SDWA And Its Regulations When States Receive Primacy Approval.

The petition for writ of certiorari must respectfully be granted because EPA's April 25, 2007 and July 30, 2007 actions, and arbitrary interpretation of the SDWA and its regulations, separately present a significant and important question of federal statutory construction that was wrongly decided by the Court of Appeals. The EPA asserted below that the SDWA and implementing regulations at 40 C.F.R. §142 "do[ ] not contain any language controlling the manner by which EPA's

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17. The 2007 FAD directs the City to spend $300 million to buy more land in the Watershed communities, an amount unparalleled by any other market purchaser—and which inherently changes land uses and community character.

determinations concerning revisions to primacy programs—such as the EPA's June 1997 determination . . . –may be modified[.]" (EPA Sur-Brief p. 24) The EPA's capricious interpretation of the SWTR directly conflicts with the plain language in 42 U.S.C. §300g-2(b)(1)-(c) and the implementing regulations, and Congress' legislative intent that the SDWA and its provisions "be primarily a state and locally run program."

The EPA's spurious interpretation of the SDWA and the regulations, that "there are no such rules regarding changes to revision determinations" (EPA Sur-Reply Brief p. 25), directly contravenes the comprehensive administrative scheme for both initial primacy approvals under 40 C.F.R. §142.11, and approvals for new or revised national primary drinking water regulations under §142.12, created by the SDWA and regulations at Part 142. The regulations dictate that all "Approved State primacy program[s]" include the initial approved primacy program and any subsequent revisions approved by the EPA, and therefore any approval of a State program revision and initial approved State primacy program "shall continue in effect unless terminated pursuant to [40 C.F.R.] §142.17." *See* 40 C.F.R. §142.11(b)(3); *see also* 40 C.F.R. §142.2. Before the EPA can take any action whatsoever when it "determines that a State no longer meets the requirements set forth in 40 CFR part 142, subpart B," for either initial program approvals under 40 C.F.R. §142.11 or new/revised program approvals under §142.12 (such as the 1997 Order), the EPA must follow the procedures in §142.17 and §142.13. *See* 40 C.F.R. §142.17(a)(2); *see also* 40 C.F.R. §142.13(a), 40 C.F.R. §142.11(b)(2), 40 C.F.R. §142.12 (d)(3)(iii).

The EPA's assertions that the SDWA and its regulations do not "control[ ] the manner by which EPA's determination concerning revisions to primacy programs . . . may be modified," directly conflicts with Congress' intent and the regulations' directive that EPA ensure that States obtain and maintain the primacy over public water systems. The question concerning the propriety of the EPA's interpretation and action is one of national implication as the EPA has improperly interpreted the SDWA and regulations in a manner that empowers the EPA to unilaterally take any action that has the effect of withdrawing prior approved and conveyed authority over all 170,000 public water systems in the Country, beyond just informally withdrawing authority over FADs across the United States as it did for the City's Catskill/Delaware systems. The Court of Appeal wrongly decided this question because its determination that Petitioners did not establish redressability ignored that EPA's actions and interpretation of the relevant provisions, if annulled as arbitrary and capricious, would have vindicated Petitioner's contract right to State primacy to act and issue the 2007 FAD as of May 15, 2007 (with a SEQRA review and impact statement). (*See also* fn 15 *supra*)

## III. Review Is Warranted To Rectify The Redressability Component For Article III Standing The Court Of Appeals Improperly Expanded In Contravention Of This Court's Decisions.

Lastly, a writ for certiorari should respectfully be issued because the Opinion improperly enlarged the standard for establishing redressability for Article III standing in direct contravention of the standard articulated by this Court in *Lujan v. Defenders of Wildlife* (504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 352 [1992]), and recently reiterated in *Sprint Communications Co., L.P., v. APCC Services, Inc.*, 128 S.Ct. 2531, 2535, 171 L.Ed.2d 424 (2008). The panel wrongly held that the Petitioners' could not establish redressability because the panel improperly created a new and affirmative obligation that Petitioners show a different subsequent outcome, *i.e.*, that the State would have acted differently or issued a different FAD if the Court annulled the EPA's actions and the State was vested with primacy. The panel created a new and affirmative legal obligation for redressability in direct conflict with the standard for redressability established by *Sprint* and *Lujan*: a litigant must only show that "it is **likely** and not merely speculative that the plaintiff's **injury will be remedied by the relief plaintiff seeks** in bringing suit[.]" *Sprint Communications Co., L.P., v. APCC Services, Inc.*, 128 S.Ct. 2531, 2535, 171 L.Ed.2d 424 (internal quotations omitted)(emphasis added).

Here, Petitioners were seeking to have DOH make the 2007 FAD decision subject to the affirmative obligations under SEQRA; SEQRA would require that DOH consider alternatives and mitigate, to the maximum extent practical, any adverse impacts on

community character, etc.. DOH can only legally make that determination after issuing a draft and final environmental impact statement. No one can plausibly know what mitigation DOH would require, if any, for the FAD.[18] As a result, the standard created by the Court of Appeals effectively eliminates any opportunity to challenge final EPA action under the SDWA, and violates this Court's analysis for standing in *Lujan*.

## CONCLUSION

The Petitioners respectfully request that the Supreme Court grant review of this matter and issue a writ of certiorari.

Respectfully submitted,

JOSEPH F. CASTIGLIONE
*Counsel of Record*
JEFFREY S. BAKER
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*Attorneys for Petitioners*

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18. These Petitioners are the real life embodiment of this Court's hypothetical in *Lujan*: people living next to a federal facility have "standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though [they] cannot establish with any certainty that the statement will cause the license to be withheld or altered[.]" 504 U.S., at 572, n. 7, 112 S.Ct. 213.

# APPENDIX

## APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED DECEMBER 29, 2008

**UNITED STATES COURT OF APPEALS**
**SECOND CIRCUIT**

**Docket Nos. 07-2449-ag (L), 07-3912-ag (Con).**

The COALITION OF WATERSHED TOWNS, The Town of Hunter, New York, The Town of Roxbury, New York, The Town of Hamden, New York,

Petitioners,

v.

The UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

and

The New York State Department of Health, Richard M. Daines, M.D., as Commissioner of the New York State Department of Health, and The City of New York,

Intervenors-Respondents.

Argued: Dec. 12, 2008.

Decided: Dec. 29, 2008.

*Appendix A*

Before: FEINBERG, CABRANES, and WESLEY, Circuit Judges.

PER CURIAM.

Petitioners are three towns in the Catskill and Delaware watershed region of New York State (the "Towns"). For many years, they actively negotiated with and litigated against New York City (the "City"), New York State (the "State"), and the United States Environmental Protection Agency (the "EPA") regarding the implementation of the Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f *et seq.* (the "SDWA"). They petition for review of two "final actions" by the EPA: (1) an April 25, 2007 letter from the EPA highlighting the State's non-compliance with certain EPA regulations regarding administrative penalties and temporarily postponing the previously scheduled transfer to the State of primary enforcement responsibility ("primacy") over the Catskill and Delaware watersheds until the State complies with the relevant regulations; and (2) a July 30, 2007 Filtration Avoidance Determination ("FAD"), which required the City to spend additional monies on land acquisition in the Catskill and Delaware watershed regions.

As a threshold matter, the EPA argues that, under the "case-or-controversy" requirement of Article III of the Constitution, the Towns lack standing to bring this petition because they have not suffered any "injury-in-fact," *i.e.*, an invasion of a legally protected interest that is "concrete and particularized . . . and [ ] actual or

imminent, not conjectural or hypothetical".[1] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks and citations omitted); *see also id.* at 560-61, 112 S.Ct. 2130 (holding that the three elements of Article III standing are (1) an "injury in fact" that is (2) causally related ("fairly traceable") to the challenged action and (3) likely to be redressed by a favorable court decision). In response, the Towns have proposed four injuries that, in their opinion, confer Article III standing: (1) breach of a Memorandum of Agreement signed by the parties in 1997 (the "MOA"), which scheduled the transfer of primacy for May 15, 2007 and capped the City's acquisition of land and easements in the Catskill and Delaware watershed regions of New York at $300 million; (2) loss of an opportunity to have the State conduct a cost-benefit analysis that would weigh the City's land acquisition against the preservation of local "community character," pursuant to the New York State Environmental Quality Review Act, 6 N.Y. Comp.Codes R. & Regs. §§ 617 *et seq.*; (3) an injury to the Towns' "legal right to determine the future economic and planning goals for their communities;" and (4) a shared interest in the City's water supply.

We raise *nostra sponte* a related question about standing: assuming *arguendo* that petitioners' alleged harms are cognizable as injuries-in-fact, are they likely

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1. At oral argument, the State and the City stated that they did not join in the EPA's argument regarding the lack of an injury-in-fact.

to be redressed by a favorable court decision? *See Lujan,* 504 U.S. at 560, 112 S.Ct. 2130. Redressability is the "non-speculative likelihood that the injury can be remedied by the requested relief." *W.R. Huff Asset Management Co., LLC v. Deloitte & Touche LLP,* 549 F.3d 100, 106-07 (2d Cir.2008). "[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130 (internal quotation marks omitted). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 107, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

Despite any injury the Coalition may allege, any relief this Court could provide is speculative. Even if we were to hold that the EPA was required by the MOA to transfer primacy to the State in May 2007, as opposed to September 2007, when they actually transferred primacy, there is no basis for us to conclude that petitioners would more likely than not be in any different position than they are now. While the State might have been required by state regulations and laws to perform a cost-benefit review of the substance of the July 2007 FAD, petitioners do not point to any evidence suggesting that the State's analysis would have substantially differed from the EPA's, or would remedy any injury alleged by petitioners. Indeed, the State's intervention in this case on the side of the EPA and in support of the June 2007 FAD leads us to conclude that the State would have promulgated substantially the same determination.

*Appendix A*

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For the foregoing reasons, we **DENY** the Towns' petition for review and enter judgments for respondents. We take no position on whether the Coalition met its injury-in-fact requirement.

## APPENDIX B — LETTER TO RONALD TRAMONTANO FROM WALTER E. MUGDAN DATED APRIL 25, 2007

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

April 25, 2007

Ronald Tramontano
Director
Center for Environmental Health
New York State Department of Health
Flanigan Square
547 River Street
Troy, New York 12180-2216

Dear Mr. Tramontano:

This letter is to inform you of the Environmental Protection Agency's (EPA) review of New York State Department of Health's (NYSDOH) revision to its Public Water Supply Supervision (PWSS) program for compliance with the National Primary Drinking Water Regulations regarding the Stage 1 Disinfectants and Disinfection Byproducts Rule (Stage 1 DBPR), Interim Enhanced Surface Water Treatment Rule (IESWTR), Long Term 1 Enhanced Surface Water Treatment Rule (LT1), the Filter Backwash Recycle Rule (FBRR), Public Notification Rule (PNR), Radionuclides Rule, and the Arsenic Rule.

*Appendix B*

NYSDOH's primacy submittal consists of Part 141 Primacy Revision Crosswalk, and Part 142 State Special Primacy Requirements and Reporting and Recordkeeping Requirements, adopted and incorporated into the NYS Sanitary Code May 26, 2004, for all above rules except for Radionuclides Rule, adopted and incorporated December 21, 2005 and for Arsenic, which was adopted and incorporated on November 1, 2006. The Attorney General Statements, which include separate ones for Arsenic and Radionuclides, and a combined one for the remaining set of rules, are included as well.

EPA is pleased that NYSDOH has made important progress in its program authorities through this primacy application. We note, however, that a pending primacy application for the Lead and Copper Rule Minor Revision (LCRMR) is still pending your submittal. As we have discussed, EPA expects to finalize additional changes to the Lead and Copper Rule in October or November of this year, NYSDOH therefore plans to delay its LCRMR primacy application, so that it can include these additional minor rule changes.

Prior to EPA's approval of all these rules, NYSDOH will need to address a concern previously identified by EPA regarding administrative penalty authority. Please see the enclosed January 4, 2007 letter from EPA to NYSDOH detailing the administrative penalty authority issue. EPA will extend the effective date for transfer of primacy to NYSDOH for the Surface Water Treatment Rule (SWTR) for the Catskill/Delaware water supply

pending resolution of the outstanding issues identified in previous correspondence, which include the need to adopt the administrative penalty provisions to equal or greater stringency than that required federally. Finally, please be advised that, when considering the establishment of an appropriate date for NYSDOH SWTR primacy for the Catskill/Delaware system, EPA may take into account its prior commitment to complete work on the 2007 Filtration Avoidance Determination prior to primacy transfer. Please keep us informed of your progress on addressing the administrative penalty authority issue.

Following resolution of this issue, EPA will proceed with Federal Register and public notification of the determination to approve the primacy applications identified above and EPA will provide written confirmation of the revised effective date for transfer of SWTR primacy to NYSDOH for the Catskill/Delaware water supply. EPA acknowledges that, pending resolution of this issue, NYSDOH will continue to implement its PWSS program pursuant to its authority under New York State statutes and regulations.

If you have further questions on this matter, please feel free to contact me or have one of your staff contact me at (212) 637-3724.

Sincerely,

Walter E. Mugdan Director

Division of Environmental Planning and Protection

## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 20, 2009

### UNITED STATES COURT OF APPEALS SECOND CIRCUIT

Docket Numbers: 07-2449-ag (L)
07-3912-ag (CON)

The Coalition of Watershed Towns, The Town of Hunter, New York, The Town of Roxbury, New York, The Town of Hamden, New York,

Petitioners,

v.

The Environmental Protection Agency,

Respondent,

and

The New York State Department of Health, and Richard M. Daines, M.D., as Commissioner of the New York State Department of Health, The City of New York,

Intervenors-Respondents.

*Appendix C*

**ORDER**

The Coalition of Watershed Towns, The Town of Hunter, New York, The Town of Roxbury, New York, The Town of Hamden, New York, having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/ Frank Perez
Frank Perez, Deputy Clerk

# APPENDIX D — RELEVANT STATUTES AND REGULATIONS

## 42 U.S.C.A. § 300g-2

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 6A. Public Health Service (Refs & Annos)
Subchapter XII. Safety of Public Water Systems
Part B. Public Water Systems

### § 300g-2. State primary enforcement responsibility

(a) In general

For purposes of this subchapter, a State has primary enforcement responsibility for public water systems during any period for which the Administrator determines (pursuant to regulations prescribed under subsection (b) of this section) that such State—

(1) has adopted drinking water regulations that are no less stringent than the national primary drinking water regulations promulgated by the Administrator under subsections (a) and (b) of section 300g-1 of this title not later than 2 years after the date on which the regulations are promulgated by the Administrator, except that the Administrator may provide for an extension of not more than 2 years if, after submission and review of appropriate, adequate documentation from the State, the

Administrator determines that the extension is necessary and justified;

(2) has adopted and is implementing adequate procedures for the enforcement of such State regulations, including conducting such monitoring and making such inspections as the Administrator may require by regulation;

(3) will keep such records and make such reports with respect to its activities under paragraphs (1) and (2) as the Administrator may require by regulation;

(4) if it permits variances or exemptions, or both, from the requirements of its drinking water regulations which meet the requirements of paragraph (1), permits such variances and exemptions under conditions and in a manner which is not less stringent than the conditions under, and the manner in which variances and exemptions may be granted under sections 300g-4 and 300g-5 of this title;

(5) has adopted and can implement an adequate plan for the provision of safe drinking water under emergency circumstances including earthquakes, floods, hurricanes, and other natural disasters, as appropriate; and

(6) has adopted authority for administrative penalties (unless the constitution of the State

prohibits the adoption of the authority) in a maximum amount—

**(A)** in the case of a system serving a population of more than 10,000, that is not less than $1,000 per day per violation; and

**(B)** in the case of any other system, that is adequate to ensure compliance (as determined by the State);

except that a State may establish a maximum limitation on the total amount of administrative penalties that may be imposed on a public water system per violation.

(b) Regulations

**(1)** The Administrator shall, by regulation (proposed within 180 days of December 16, 1974), prescribe the manner in which a State may apply to the Administrator for a determination that the requirements of paragraphs (1), (2), (3), and (4) of subsection (a) of this section are satisfied with respect to the State, the manner in which the determination is made, the period for which the determination will be effective, and the manner in which the Administrator may determine that such requirements are no longer met. Such regulations shall require that before a determination of the Administrator that such requirements are met or are no longer met with respect to a State may become effective, the Administrator shall notify such State of

the determination and the reasons therefor and shall provide an opportunity for public hearing on the determination. Such regulations shall be promulgated (with such modifications as the Administrator deems appropriate) within 90 days of the publication of the proposed regulations in the Federal Register. The Administrator shall promptly notify in writing the chief executive officer of each State of the promulgation of regulations under this paragraph. Such notice shall contain a copy of the regulations and shall specify a State's authority under this subchapter when it is determined to have primary enforcement responsibility for public water systems.

(2) When an application is submitted in accordance with the Administrator's regulations under paragraph (1), the Administrator shall within 90 days of the date on which such application is submitted (A) make the determination applied for, or (B) deny the application and notify the applicant in writing of the reasons for his denial.

(c) Interim primary enforcement authority

A State that has primary enforcement authority under this section with respect to each existing national primary drinking water regulation shall be considered to have primary enforcement authority with respect to each new or revised national primary drinking water regulation during the period beginning on the effective date of a regulation adopted and submitted by the State with respect to the new or revised national primary

drinking water regulation in accordance with subsection (b)(1) of this section and ending at such time as the Administrator makes a determination under subsection (b)(2)(B) of this section with respect to the regulation.

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## 42 U.S.C.A. § 300j-7

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 6A. Public Health Service (Refs & Annos)
Subchapter XII. Safety of Public Water Systems
Part E. General Provisions

### § 300j-7. Judicial review

(a) Courts of appeals; petition for review; actions respecting regulations; filing period; grounds arising after expiration of filing period; exclusiveness of remedy

A petition for review of—

(1) actions pertaining to the establishment of national primary drinking water regulations (including maximum contaminant level goals) may be filed only in the United States Court of Appeals for the District of Columbia circuit; and

(2) any other final action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action.

Any such petition shall be filed within the 45-day period beginning on the date of the promulgation of the regulation or any other final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought,

and may be filed after the expiration of such 45-day period if the petition is based solely on grounds arising after the expiration of such period. Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or in any civil action to enjoin enforcement. In any petition concerning the assessment of a civil penalty pursuant to section 300g-3(g)(3)(B) of this title, the petitioner shall simultaneously send a copy of the complaint by certified mail to the Administrator and the Attorney General. The court shall set aside and remand the penalty order if the court finds that there is not substantial evidence in the record to support the finding of a violation or that the assessment of the penalty by the Administrator constitutes an abuse of discretion.

(b) District courts; petition for review; actions respecting variances or exemptions; filing period; grounds arising after expiration of filing period; exclusiveness of remedy

The United States district courts shall have jurisdiction of actions brought to review (1) the granting of, or the refusing to grant, a variance or exemption under section 300g-4 or 300g-5 of this title or (2) the requirements of any schedule prescribed for a variance or exemption under such section or the failure to prescribe such a schedule. Such an action may only be brought upon a petition for review filed with the court within the 45-day period beginning on the date the action sought to be reviewed is taken or, in the case of a petition to

review the refusal to grant a variance or exemption or the failure to prescribe a schedule, within the 45-day period beginning on the date action is required to be taken on the variance, exemption, or schedule, as the case may be. A petition for such review may be filed after the expiration of such period if the petition is based solely on grounds arising after the expiration of such period. Action with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or in any civil action to enjoin enforcement.

(c) Judicial order for additional evidence before Administrator; modified or new findings; recommendation for modification or setting aside of original determination

In any judicial proceeding in which review is sought of a determination under this subchapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new

findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

*Appendix D*

## 40 C.F.R. § 142.2

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 142. National Primary Drinking Water Regulations Implementation (Refs & Annos)
Subpart A. General Provisions

**§ 142.2 Definitions.**

As used in this part, and except as otherwise specifically provided:

Act means the Public Health Service Act.

Administrator means the Administrator of the United States Environmental Protection Agency or his authorized representative.

Agency means the United States Environmental Protection Agency.

Approved State primacy program consists of those program elements listed in § 142.11(a) that were submitted with the initial State application for primary enforcement authority and approved by the EPA Administrator and all State program revisions thereafter that were approved by the EPA Administrator.

*Appendix D*

Contaminant means any physical, chemical, biological, or radiological substance or matter in water.

Federal agency means any department, agency, or instrumentality of the United States.

Indian Tribe means any Indian Tribe having a Federally recognized governing body carrying out substantial governmental duties and powers over a defined area.

Interstate Agency means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States or Indian Tribes having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

Maximum contaminant level means the maximum permissible level of a contaminant in water which is delivered to the free flowing outlet of the ultimate user of a public water system; except in the case of turbidity where the maximum permissible level is measured at the point of entry to the distribution system. Contaminants added to the water under circumstances controlled by the user, except for those resulting from corrosion of piping and plumbing caused by water quality are excluded from this definition.

Municipality means a city, town, or other public body created by or pursuant to State law, or an Indian Tribe which does not meet the requirements of Subpart H of this part.

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National primary drinking water regulation means any primary drinking water regulation contained in Part 141 of this chapter.

Person means an individual; corporation; company; association; partnership; municipality; or State, federal, or Tribal agency.

Primary enforcement responsibility means the primary responsibility for administration and enforcement of primary drinking water regulations and related requirements applicable to public water systems within a State.

Public water system or PWS means a system for the provision to the public of water for human consumption through pipes or, after August 5, 1998, other constructed conveyances, if such system has at least fifteen service connections or regularly serves an average of at least twenty-five individuals daily at least 60 days out of the year. Such term includes:

Any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system; and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. Such term does not include any "special irrigation district." A public water system is either a "community water system" or a "noncommunity water system" as defined in § 141.2.

*Appendix D*

Sanitary survey means an onsite review of the water source, facilities, equipment, operation and maintenance of a public water system for the purpose of evaluating the adequacy of such source, facilities, equipment, operation and maintenance for producing and distributing safe drinking water.

Service connection, as used in the definition of public water system, does not include a connection to a system that delivers water by a constructed conveyance other than a pipe if:

(1) The water is used exclusively for purposes other than residential uses (consisting of drinking, bathing, and cooking, or other similar uses);

(2) The Administrator or the State exercising primary enforcement responsibility for public water systems, determines that alternative water to achieve the equivalent level of public health protection provided by the applicable national primary drinking water regulation is provided for residential or similar uses for drinking and cooking; or

(3) The Administrator or the State exercising primary enforcement responsibility for public water systems, determines that the water provided for residential or similar uses for drinking, cooking, and bathing is centrally treated or treated at the point of entry by the provider, a pass-through entity, or the user to achieve the equivalent level of protection provided by the applicable national primary drinking water regulations.

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Special irrigation district means an irrigation district in existence prior to May 18, 1994 that provides primarily agricultural service through a piped water system with only incidental residential or similar use where the system or the residential or similar users of the system comply with the exclusion provisions in section 1401(4)(B)(i)(II) or (III).

State means one of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an eligible Indian tribe.

State primary drinking water regulation means a drinking water regulation of a State which is comparable to a national primary drinking water regulation.

State program revision means a change in an approved State primacy program.

Supplier of water means any person who owns or operates a public water system.

Treatment technique requirement means a requirement of the national primary drinking water regulations which specifies for a contaminant a specific treatment technique(s) known to the Administrator which leads to a reduction in the level of such contaminant sufficient to comply with the requirements of Part 141 of this chapter.

*Appendix D*

## 42 C.F.R. § 142.10

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 142. National Primary Drinking Water Regulations Implementation (Refs & Annos)
Subpart B. Primary Enforcement Responsibility

### § 142.10 Requirements for a determination of primary enforcement responsibility.

A State has primary enforcement responsibility for public water systems in the State during any period for which the Administrator determines, based upon a submission made pursuant to § 142.11, and submission under § 142.12, that such State, pursuant to appropriate State legal authority:

(a) Has adopted drinking water regulations which are no less stringent than the national primary drinking water regulations (NPDWRs) in effect under part 141 of this chapter;

(b) Has adopted and is implementing adequate procedures for the enforcement of such State regulations, such procedures to include:

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(1) Maintenance of an inventory of public water systems.

(2) A systematic program for conducting sanitary surveys of public water systems in the State, with priority given to sanitary surveys of public water systems not in compliance with State primary drinking water regulations.

(3)(i) The establishment and maintenance of a State program for the certification of laboratories conducting analytical measurements of drinking water contaminants pursuant to the requirements of the State primary drinking water regulations including the designation by the State of a laboratory officer, or officers, certified by the Administrator, as the official(s) responsible for the State's certification program. The requirements of this paragraph may be waived by the Administrator for any State where all analytical measurements required by the State's primary drinking water regulations are conducted at laboratories operated by the State and certified by the Agency. Until such time as the Agency establishes a National quality assurance program for laboratory certification the State shall maintain an interim program for the purpose of approving those laboratories from which the required analytical measurements will be acceptable.

(ii) Upon a showing by an Indian Tribe of an intergovernmental or other agreement to have all

analytical tests performed by a certified laboratory, the Administrator may waive this requirement.

(4) Assurance of the availability to the State of laboratory facilities certified by the Administrator and capable of performing analytical measurements of all contaminants specified in the State primary drinking water regulations. Until such time as the Agency establishes a National quality assurance program for laboratory certification the Administrator will approve such State laboratories on an interim basis.

(5) The establishment and maintenance of an activity to assure that the design and construction of new or substantially modified public water system facilities will be capable of compliance with the State primary drinking water regulations.

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## 40 C.F.R. § 142.11

40 C.F.R. § 142.11
Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 142. National Primary Drinking Water Regulations Implementation (Refs & Annos)
Subpart B. Primary Enforcement Responsibility

**§ 142.11 Initial determination of primary enforcement responsibility.**

(a) A State may apply to the Administrator for a determination that the State has primary enforcement responsibility for public water systems in the State pursuant to section 1413 of the Act. The application shall be as concise as possible and include a side-by-side comparison of the Federal requirements and the corresponding State authorities, including citations to the specific statutes and administrative regulations or ordinances and, wherever appropriate, judicial decisions which demonstrate adequate authority to meet the requirements of § 142.10. The following information is to be included with the State application.

(1) The text of the State's primary drinking water regulations, with references to those State regulations that vary from comparable regulations

set forth in part 141 of this chapter, and a demonstration that any different State regulation is at least as stringent as the comparable regulation contained in part 141.

(2) A description, accompanied by appropriate documentation, of the State's procedures for the enforcement of the State primary drinking water regulations. The submission shall include:

(i) A brief description of the State's program to maintain a current inventory of public water systems.

(ii) A brief description of the State's program for conducting sanitary surveys, including an explanation of the priorities given to various classes of public water systems.

(iii) A brief description of the State's laboratory approval or certification program, including the name(s) of the responsible State laboratory officer(s) certified by the Administrator.

(iv) Identification of laboratory facilities, available to the State, certified or approved by the Administrator and capable of performing analytical measurements of all contaminants specified in the State's primary drinking water regulations.

(v) A brief description of the State's program activity to assure that the design and construction of new or substantially modified public water system

facilities will be capable of compliance with the requirements of the State primary drinking water regulations.

(vi) Copies of State statutory and regulatory provisions authorizing the adoption and enforcement of State primary drinking water regulations, and a brief description of State procedures for administrative or judicial action with respect to public water systems not in compliance with such regulations.

(3) A statement that the State will make such reports and will keep such records as may be required pursuant to §§ 142.14 and 142.15.

(4) If the State permits variances or exemptions from its primary drinking water regulations, the text of the State's statutory and regulatory provisions concerning variances and exemptions.

(5) A brief description of the State's plan for the provision of safe drinking water under emergency conditions.

Note: In satisfaction of this requirement, for public water supplies from groundwater sources, EPA will accept the contingency plan for providing alternate drinking water supplies that is part of a State's Wellhead Protection Program, where such program has been approved by EPA pursuant to section 1428 of the SDWA.

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(6)(i) A copy of the State statutory and regulatory provisions authorizing the executive branch of the State government to impose an administrative penalty on all public water systems, and a brief description of the State's authority for administrative penalties that will ensure adequate compliance of systems serving a population of 10,000 or fewer individuals.

(ii) In instances where the State constitution prohibits the executive branch of the State government from assessing any penalty, the State shall submit a copy of the applicable part of its constitution and a statement from its Attorney General confirming this interpretation.

(7)(i) A statement by the State Attorney General (or the attorney for the State primacy agency if it has independent legal counsel) or the attorney representing the Indian tribe that certifies that the laws and regulations adopted by the State or tribal ordinances to carry out the program were duly adopted and are enforceable. State statutes and regulations cited by the State Attorney General and tribal ordinances cited by the attorney representing the Indian tribe shall be in the form of lawfully adopted State statutes and regulations or tribal ordinances at the time the certification is made and shall be fully effective by the time the program is approved by EPA. To qualify as "independent legal counsel," the attorney signing the statement required by this section shall have full authority to

independently represent the State primacy agency or Indian tribe in court on all matters pertaining to the State or tribal program.

(ii) After EPA has received the documents required under paragraph (a) of this section, EPA may selectively require supplemental statements by the State Attorney General (or the attorney for the State primacy agency if it has independent legal counsel) or the attorney representing the Indian tribe. Each supplemental statement shall address all issues concerning the adequacy of State authorities to meet the requirements of § 142.10 that have been identified by EPA after thorough examination as unresolved by the documents submitted under paragraph (a) of this section.

(b)(1) The administrator shall act on an application submitted pursuant to § 142.11 within 90 days after receiving such application, and shall promptly inform the State in writing of this action. If he denies the application, his written notification to the State shall include a statement of reasons for the denial.

(2) A final determination by the Administrator that a State has met or has not met the requirements for primary enforcement responsibility shall take effect in accordance with the public notice requirements and related procedures under § 142.13.

(3) When the Administrator's determination becomes effective pursuant to § 142.13, it shall continue in effect unless terminated pursuant to § 142.17.

*Appendix D*

## 40 C.F.R. § 142.12

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 142. National Primary Drinking Water Regulations Implementation (Refs & Annos)
Subpart B. Primary Enforcement Responsibility

### § 142.12 Revision of State programs.

(a) General requirements. Either EPA or the primacy State may initiate actions that require the State to revise its approved State primacy program. To retain primary enforcement responsibility, States must adopt all new and revised national primary drinking water regulations promulgated in part 141 of this chapter and any other requirements specified in this part.

(1) Whenever a State revises its approved primacy program to adopt new or revised Federal regulations, the State must submit a request to the Administrator for approval of the program revision, using the procedures described in paragraphs (b), (c), and (d) of this section. The Administrator shall approve or disapprove each State request for approval of a program revision based on the requirements of the Safe Drinking Water Act and of this part.

(2) For all State program revisions not covered under § 142.12(a)(1), the review procedures outlined in § 142.17(a) shall apply.

(b) Timing of State requests for approval of program revisions to adopt new or revised Federal regulations.

(1) Complete and final State requests for approval of program revisions to adopt new or revised EPA regulations must be submitted to the Administrator not later than 2 years after promulgation of the new or revised EPA regulations, unless the State requests an extension and the Administrator has approved the request pursuant to paragraph (b)(2) of this section. If the State expects to submit a final State request for approval of a program revision to EPA more than 2 years after promulgation of the new or revised EPA regulations, the State shall request an extension of the deadline before the expiration of the 2-year period.

(2) The final date for submission of a complete and final State request for a program revision may be extended by EPA for up to a two-year period upon a written application by the State to the Administrator. In the extension application the State must demonstrate it is requesting the extension because it cannot meet the original deadline for reasons beyond its control despite a good faith effort to do so. The application must include a schedule for the submission of a final request by a certain time and provide sufficient information to demonstrate that the State:

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(i)(A) Currently lacks the legislative or regulatory authority to enforce the new or revised requirements, or

(B) Currently lacks the program capability adequate to implement the new or revised requirements; or

(C) Is requesting the extension to group two or more program revisions in a single legislative or regulatory action; and

(ii) Is implementing the EPA requirements to be adopted by the State in its program revision pursuant to paragraph (b)(3) of this section within the scope of its current authority and capabilities.

(3) To be granted an extension, the State must agree with EPA to meet certain requirements during the extension period, which may include the following types of activities as determined appropriate by the Administrator on a case-by-case basis:

(i) Informing public water systems of the new EPA (and upcoming State) requirements and that EPA will be overseeing implementation of the requirements until the State, if eligible for interim primacy, submits a complete and final primacy revision request to EPA, or in all other cases, until EPA approves the State program revision;

(ii) Collecting, storing and managing laboratory results, public notices, and other compliance and operation data required by the EPA regulations;

(iii) Assisting EPA in the development of the technical aspects of enforcement actions and conducting informal follow-up on violations (telephone calls, letters, etc.);

(iv) Providing technical assistance to public water systems;

(v) Providing EPA with all information prescribed by § 142.15 of this part on State reporting; and

(vi) For States whose request for an extension is based on a current lack of program capability adequate to implement the new requirements, taking steps agreed to by EPA and the State during the extension period to remedy the deficiency.

(c) Contents of a State request for approval of a program revision.

(1) The State request for EPA approval of a program revision shall be concise and must include:

(i) The documentation necessary (pursuant to § 142.11(a)) to update the approved State primacy program, and identification of those elements of the approved State primacy program that have not changed because of the program revision. The

documentation shall include a side-by-side comparison of the Federal requirements and the corresponding State authorities, including citations to the specific statutes and administrative regulations or ordinances and, wherever appropriate, judicial decisions which demonstrate adequate authority to meet the requirements of § 142.10 as they apply to the program revision.

(ii) Any additional materials that are listed in § 142.16 of this part for a specific EPA regulation, as appropriate; and

(iii) For a complete and final State request only, unless one of the conditions listed in paragraph (c)(2) of this section are met, a statement by the State Attorney General (or the attorney for the State primacy agency if it has independent legal counsel) or the attorney representing the Indian tribe that certifies that the laws and regulations adopted by the State or tribal ordinances to carry out the program revision were duly adopted and are enforceable. State statutes and regulations cited by the State Attorney General and tribal ordinances cited by the attorney for the Indian tribe shall be in the form of lawfully adopted State statutes and regulations or tribal ordinances at the time the certification is made and shall be fully effective by the time the request for program revision is approved by EPA. To qualify as "independent legal counsel," the attorney signing the statement required by this section shall have full authority to

independently represent the State primacy agency or tribe in court on all matters pertaining to the State or tribal program.

(2) An Attorney General's statement will be required as part of the State request for EPA approval of a program revision unless EPA specifically waives this requirement for a specific regulation at the time EPA promulgates the regulation, or by later written notice from the Administrator to the State.

(3) After EPA has received the documents required under paragraph (c)(1) of this section, EPA may selectively require supplemental statements by the State Attorney General (or the attorney for the State primacy agency if it has independent legal counsel) or the attorney representing the Indian tribe. Each supplemental statement shall address all issues concerning the adequacy of State authorities to meet the requirements of § 142.10 that have been identified by EPA after thorough examination as unresolved by the documents submitted under paragraph (c)(1) of this section.

(d) Procedures for review of a State request for approval of a program revision—

(1) Preliminary request.

(i) The State may submit to the Administrator for his or her review a preliminary request for approval

of each program revision, containing the information listed in paragraph (c)(1) of this section, in draft form. The preliminary request does not require an Attorney General's statement in draft form, but does require draft State statutory or regulatory changes and a side-by-side comparison of State authorities with EPA requirements to demonstrate that the State program revision meets EPA requirements under § 142.10 of this part. The preliminary request should be submitted to the Administrator as soon as practicable after the promulgation of the EPA regulations.

(ii) The Administrator will review the preliminary request submitted in accordance with paragraph (d)(1)(i) of this section and make a tentative determination on the request. The Administrator will send the tentative determination and other comments or suggestions to the State for its use in developing the State's final request under paragraph (d)(2) of this section.

(2) Final request. The State must submit a complete and final request for approval of a program revision to the Administrator for his or her review and approval. The request must contain the information listed in paragraph (c)(1) of this section in complete and final form, in accordance with any tentative determination EPA may have issued. Complete and final State requests for program revisions shall be submitted within two years of the promulgation of the new or revised EPA regulations, as specified in paragraph (b) of this section.

(3) EPA's determination on a complete and final request.

(i) The Administrator shall act on a State's request for approval of a program revision within 90 days after determining that the State request is complete and final and shall promptly notify the State of his/her determination.

(ii) If the Administrator disapproves a final request for approval of a program revision, the Administrator will notify the State in writing. Such notification will include a statement of the reasons for disapproval.

(iii) A final determination by the Administrator on a State's request for approval of a program revision shall take effect in accordance with the public notice requirements and related procedures under § 142.13.

(e) Interim primary enforcement authority. A State with an approved primacy program for each existing national primary drinking water regulation shall be considered to have interim primary enforcement authority with respect to each new or revised national drinking water regulation that it adopts beginning when the new or revised State regulation becomes effective or when the complete primacy revision application is submitted to the Administrator, whichever is later, and shall end when the Administrator approves or disapproves the State's revised primacy program.

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## 40 C.F.R. § 142.13

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 142. National Primary Drinking Water Regulations Implementation (Refs & Annos)
Subpart B. Primary Enforcement Responsibility

### § 142.13 Public hearing.

(a) The Administrator shall provide an opportunity for a public hearing before a final determination pursuant to § 142.11 that the State meets or does not meet the requirements for obtaining primary enforcement responsibility, or a final determination pursuant to § 142.12(d)(3) to approve or disapprove a State request for approval of a program revision, or a final determination pursuant to § 142.17 that a State no longer meets the requirements for primary enforcement responsibility.

(b) The Administrator shall publish notice of any determination specified in paragraph (a) of this section in the Federal Register and in a newspaper or newspapers of general circulation in the State involved within 15 days after making such determination, with a statement of his reasons for the determination. Such notice shall inform interested persons that they may

request a public hearing on the Administrator's determination. Such notice shall also indicate one or more locations in the State where information submitted by the State pursuant to § 142.11 is available for inspection by the general public. A public hearing may be requested by any interested person other than a Federal agency. Frivolous or insubstantial requests for hearing may be denied by the Administrator.

(c) Requests for hearing submitted pursuant to paragraph (b) of this section shall be submitted to the Administrator within 30 days after publication of notice of opportunity for hearing in the Federal Register. Such requests shall include the following information:

(1) The name, address and telephone number of the individual, organization or other entity requesting a hearing.

(2) A brief statement of the requesting person's interest in the Administrator's determination and of information that the requesting person intends to submit at such hearing.

(3) The signature of the individual making the request; or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

(d) The Administrator shall give notice in the Federal Register and in a newspaper or newspapers of general

circulation in the State involved of any hearing to be held pursuant to a request submitted by an interested person or on his own motion. Notice of the hearing shall also be sent to the person requesting a hearing, if any, and to the State involved. Notice of the hearing shall include a statement of the purpose of the hearing, information regarding the time and location or locations for the hearing and the address and telephone number of an office at which interested persons may obtain further information concerning the hearing. At least one hearing location specified in the public notice shall be within the involved State. Notice of hearing shall be given not less than 15 days prior to the time scheduled for the hearing.

(e) Hearings convened pursuant to paragraph (d) of this section shall be conducted before a hearing officer to be designated by the Administrator. The hearing shall be conducted by the hearing officer in an informal, orderly and expeditious manner. The hearing officer shall have authority to call witnesses, receive oral and written testimony and take such other action as may be necessary to assure the fair and efficient conduct of the hearing. Following the conclusion of the hearing, the hearing officer shall forward the record of the hearing to the Administrator.

(f) After reviewing the record of the hearing, the Administrator shall issue an order affirming the determination referred to in paragraph (a) of this section or rescinding such determination. If the determination is affirmed, it shall become effective as of the date of the Administrator's order.

(g) If no timely request for hearing is received and the Administrator does not determine to hold a hearing on his own motion, the Administrator's determination shall become effective 30 days after notice is issued pursuant to paragraph (b) of this section.

(h) If a determination of the Administrator that a State no longer meets the requirements for primary enforcement responsibility becomes effective, the State may subsequently apply for a determination that it meets such requirements by submitting to the Administrator information demonstrating that it has remedied the deficiencies found by the Administrator without adversely sacrificing other aspects of its program required for primary enforcement responsibility.

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## 40 C.F.R. § 142.17

Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 142. National Primary Drinking Water Regulations Implementation (Refs & Annos)
Subpart B. Primary Enforcement Responsibility

### § 142.17 Review of State programs and procedures for withdrawal of approved primacy programs.

(a)(1) At least annually the Administrator shall review, with respect to each State determined to have primary enforcement responsibility, the compliance of the State with the requirements set forth in 40 CFR part 142, subpart B, and the approved State primacy program. At the time of this review, the State shall notify the Administrator of any State-initiated program changes (i.e., changes other than those to adopt new or revised EPA regulations), and of any transfer of all or part of its program from the approved State agency to any other State agency.

(2) When, on the basis of the Administrator's review or other available information, the Administrator determines that a State no longer meets the requirements set forth in 40 CFR part 142, subpart

B, the Administrator shall initiate proceedings to withdraw primacy approval. Among the factors the Administrator intends to consider as relevant to this determination are the following, where appropriate: whether the State has requested and has been granted, or is awaiting EPA's decision on, an extension under § 142.12(b)(2) of the deadlines for meeting those requirements; and whether the State is taking corrective actions that may have been required by the Administrator. The Administrator shall notify the State in writing that EPA is initiating primacy withdrawal proceedings and shall summarize in the notice the information available that indicates that the State no longer meets such requirements.

(3) The State notified pursuant to paragraph (a)(2) of this section may, within 30 days of receiving the Administrator's notice, submit to the Administrator evidence demonstrating that the State continues to meet the requirements for primary enforcement responsibility.

(4) After reviewing the submission of the State, if any, made pursuant to paragraph (a)(3) of this section, the Administrator shall make a final determination either that the State no longer meets the requirements of 40 CFR part 142, subpart B, or that the State continues to meet those requirements, and shall notify the State of his or her determination. Any final determination that the State no longer meets the requirements of 40 CFR

part 142, subpart B, shall not become effective except as provided in § 142.13.

(b) If a State which has primary enforcement responsibility decides to relinquish that authority, it may do so by notifying the Administrator in writing of the State's decision at least 90 days before the effective date of the decision.

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No. 08-1420

Supreme Court, U.S.
FILED
JUN 16 2009
OFFICE OF THE CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

THE COALITION OF WATERSHED TOWNS, THE TOWN OF HUNTER, NEW YORK, THE TOWN OF ROXBURY, NEW YORK, AND THE TOWN OF HAMDEN, NEW YORK,

*Petitioners*,

-v.-

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE NEW YORK STATE DEPARTMENT OF HEALTH, RICHARD M DAINES, M.D., AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH, AND THE CITY OF NEW YORK,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN OPPOSITION FOR RESPONDENT CITY OF NEW YORK

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## STATEMENT

All public water systems in the nation are regulated by EPA pursuant to the Safe Drinking Water Act ("SDWA"). 42 U.S.C. § 300f *et seq.* Under this authority, in 1989, EPA adopted the Surface Water Treatment Rule ("SWTR"), which requires public water suppliers relying on surface water to filter that water, unless certain objective and subjective "filtration avoidance criteria" are satisfied. *See* 40 C.F.R. § 141.71. The objective criteria require that source water meet the turbidity and fecal coliform standards of the SWTR, that there be no source-related violations of the Coliform Rule, and that there be no waterborne disease outbreaks. *See* 40 C.F.R. § 141.71(a). The subjective criteria require that the public water supplier maintain a watershed control program that minimizes the potential for contamination of the water supply. *See* 40 C.F.R. § 141.71(b). To meet this criterion, a public water supplier must demonstrate that it either owns the lands within the water supply watershed or has adequate control over all land use activities in the watershed that could give rise to contamination of the water supply. If a public water supplier meets these criteria, it can obtain a waiver of the filtration requirement, known as a filtration avoidance determination or "FAD." *See* 40 C.F.R. § 141.71.

EPA may delegate primary enforcement responsibility (or "primacy") for rules promulgated under the Safe Drinking Water Act to states which have adopted drinking water regulations that are at least as stringent as the federal rules. 42 U.S.C. § 300g-2(a); 40 C.F.R. § 142.10. In 1997, EPA delegated primacy for the SWTR to the New York State Department of Health for all surface water sources within New York State except the Catskill/Delaware System, operated by the City of

New York. The State and EPA agreed that EPA would "retain SWTR primacy for New York City's Catskill/Delaware water supply system until May 15, 2007." 62 Fed. Reg. 41,049 (July 31, 1997). EPA's announcement of the transfer of primacy explained that the delay in the effective date was to allow EPA "to provide the appropriate oversight of New York City's implementation of the conditions of a Filtration Avoidance Determination issued on May 6, 1997," and also to "allow time for [the New York State Department of Health] to strengthen its oversight program for New York City's Catskill/Delaware system." *Id.* EPA later delayed the effective date of the primacy transfer by letter dated April 25, 2007, and primacy ultimately transferred to the New York State Department of Health on September 26, 2007.

The City of New York ("the City"), through its Department of Environmental Protection, operates a public drinking water supply system located in the Catskill region of upstate New York as an unfiltered water supply system under a series of Filtration Avoidance Determinations from EPA dating back to 1993, referred to as the Catskill/Delaware system. *See* Pet. Supp. App. at 4-6.[1] To ensure the quality of this drinking water, the City has undertaken a comprehensive watershed protection program, consisting of three main elements: (1) a Land Acquisition Program, through which the City purchases land from willing sellers to protect undeveloped, environmentally sensitive watershed lands; (2) a set of extensive Watershed Rules and Regulations, developed by the City and authorized under the New York Public Health Law, N.Y. Pub. Health Law § 1100(1)

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[1] "Pet. Supp. App." refers to the Supplemental Appendix to the Petition for a Writ of Certiorari.

(McKinney 2002), that apply to land uses within the Watershed that have the potential to affect water quality;[2] and (3) a suite of Watershed Protection and Partnership Programs funded by the City in areas such as wastewater infrastructure and control equipment, stormwater control, and management of agricultural runoff. *See* Pet. Supp. App. at 25-77.

These programs make up the City's watershed protection program, most recently approved by the EPA in consultation with the New York State Department of Health in a FAD issued in July 2007. *See* Pet. Supp. App. at 1. The basic structures of these programs were also set forth and agreed to by the City, State, EPA, upstate communities (including the Petitioners here), and various environmental groups in a 1997 Watershed Memorandum of Agreement (MOA), which established the institutional framework needed to implement the range of protection programs identified as necessary by the City, the State, and EPA to maintain filtration avoidance for the City's Catskill/Delaware system. *See* Pet. Supp. App. at 5-6. Together, the Watershed Regulations, the Land Acquisition Program, and the numerous partnership programs allow the City to adequately control all human activities within the watershed with the potential to adversely affect water quality, thus meeting the requirements of the SWTR. *See* Pet. Supp. App. at 19-21.

Petitioners, three municipalities located within the City's watershed and an association representing those and other watershed

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[2] The Watershed Rules and Regulations are found at N.Y. Comp. Codes R. & Regs. tit. 10 Part 128 (2007) and R. City of N.Y. tit. 15, Chap. 18 (2008).

communities, brought a petition for review in the Second Circuit to challenge EPA's July 2007 determination, made in consultation with the New York State Department of Health, that the City's long-term watershed protection program for its Catskill/Delaware water supply meets the requirements of the Surface Water Treatment Rule. Petitioners also sought to nullify EPA's decision to delay the transfer of primacy to the State until September 2007. The Second Circuit held that Petitioners could not establish Article III standing to bring the petition because a favorable decision on the petition could provide only speculative relief, and any alleged injury suffered by Petitioners would not be redressed by a favorable decision. *Coalition of Watershed Towns v. EPA*, 552 F.3d 216, 217 (2d Cir. 2008).

## REASONS FOR DENYING THE PETITION

Petitioners have not identified any circuit split, novel issue of federal law, or other reason to invoke this Court's jurisdiction. Contrary to Petitioners' claim, the decision of the Second Circuit does not impose a new standing requirement, but rather is in line with this Court's established standing jurisprudence. And in any event, Petitioners' claims under the Safe Drinking Water Act and its implementing regulations are without merit, as EPA's interpretations of the relevant statutory and regulatory provisions are reasonable and entitled to substantial deference.

1. The petition presents no conflict with any decision of this Court nor any split of authority among the circuits. While case law interpreting EPA's primacy regulations is sparse, those cases generally recognize EPA's broad discretion to interpret and administer the primacy process and the complex regulatory regime governing drinking

water supplies. *See, e.g., Nat'l Wildlife Federation v. EPA*, 980 F.2d 765, 770 (D.C. Cir. 1992); *Nat'l Wildlife Federation v. EPA*, 925 F.2d 470, 474-76 (D.C. Cir. 1991) (discussing EPA's discretion over the mechanics of primacy grant and withdrawal). This is consistent with the clear instruction of this Court that an "agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 127 S. Ct. 2518, 2537-38 (2007) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Petitioners do not cite a single case offering a contrary interpretation of the primacy regulations.

2. Next, Petitioners are incorrect when they argue that the Second Circuit imposed a new standing requirement on them. Rather, the decision is in line with this Court's established standing jurisprudence. Although Petitioners seek to invalidate EPA's decision to delay the effective date of the transfer of primacy to the State, the actual remedy they desire is an additional level of review of the City's program by the New York State Department of Health. *See* Pet. Br. at 16-21 (identifying an injury to Petitioners' "right" to have the State issue any FADs for the Catskill/Delaware System after May 15, 2007, subject to environmental review under state law). But as the Court explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), a case in which the relief that would redress the injuries complained of required action from non-party agencies, "it is entirely conjectural whether the non-agency activity that affects [petitioners] will be altered or affected by the agency activity that they seek to achieve." *Lujan*, 504 U.S. at 571. The Second Circuit properly concluded that Petitioners had failed to

demonstrate a redressable injury, especially where, as here, New York State Department of Health did not object to the delay in primacy transfer, was consulted on EPA's determination to approve filtration avoidance, and intervened as a respondent to help defend EPA's actions. *See Coalition of Watershed Towns*, 552 F.3d at 217 (citing *Lujan* and *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83 (1998)).

Petitioners' claimed procedural right, relying on *Massachusetts v. EPA*, 549 U.S. 497 (2007), also fails to give them standing. The Court in *Massachusetts v. EPA* stated that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' ... 'can assert that right without meeting all the normal standards for redressability and immediacy.'" 549 U.S. at 517-18 (citing *Lujan*, 504 U.S. at 572). However, the Court still required that a litigant "vested with a procedural right" show that "there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant" in order to establish standing. *Id.*, 549 U.S. at 518. Petitioners have not made any comparable showing of redressability in the case at bar.

In addition, here, the procedural right Petitioners claim is the ability to "challenge *any* EPA action made under the SDWA." Pet. Br. at 30 (emphasis in original). But the right to challenge an agency action is not the "concrete interest" needed to confer standing even when invoking a procedural right; rather, it is simply a generalized and "abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Lujan*, 504 U.S. at 573. This is plainly insufficient to establish Article III standing.

3. Finally, Petitioners' claims that EPA's delay in transferring primacy to New York State Department of Health constituted an improper withdrawal of primacy and that the City's watershed protection program does not satisfy the requirements of the SWTR are entirely without merit.

The SDWA affords EPA wide discretion to establish the procedures and criteria for deciding when to grant and withdraw primacy. *Nat'l Wildlife Federation v. EPA*, 980 F.2d at 770. Reflecting the practical realities involved with effective safe drinking water enforcement, the primacy procedural regulations allow the agency substantial leeway to address primacy administration in informal ways. *See Nat'l Wildlife Federation v. EPA*, 925 F.2d at 474-76 (discussing EPA's discretion over the mechanics of primacy grant and withdrawal). Moreover, "[i]nterpretation of the procedural regulations pertaining to the grant, modification, and withdrawal of primacy ... are matters within the [EPA's] expertise, and entitled to deference." *HRI, Inc. v. EPA*, 198 F.3d 1224, 1241 (10th Cir. 2000). Petitioners' claim that the delay in transfer of primacy was improper fails in light of the well established deference owed to EPA in administering its own regulations.

Petitioners' argument is also based on an incorrect premise, i.e., that the New York State Department of Health had received primacy as of May 15, 2007. Although EPA's original decision approving primacy listed May 15, 2007 as the effective primacy transfer date for the Catskill/Delaware system, intervening events cannot be ignored. On April 25, 2007 the EPA further delayed the effective date of primacy in order to give the State additional time to pass legislation authorizing the administrative penalties

required under the SDWA, also allowing the agency to complete work on the 2007 FAD. Pet. App. B at 6a-8a.[3] EPA's decision to delay was reasonable under the circumstances and fully permissible under the substantial administrative flexibility inherent in the primacy regulations.

Similarly, Petitioners' arguments against the City's watershed protection program also ignore the substantial deference owed to EPA's interpretation of the Surface Water Treatment Rule. The Safe Drinking Water Act was enacted to ensure that public water supply systems meet minimum national standards for the protection of public health. Nat'l Wildlife Fed'n v. EPA, 980 F.2d at 768. Pursuant to the statute, EPA must establish primary drinking water regulations specifying treatment techniques or maximum levels of contaminants that may have an adverse effect on the health of consumers. 42 U.S.C. § 300g-1.

As required by the 1986 amendments to the SDWA, in 1989 EPA promulgated the Surface Water Treatment Rule. 54 Fed. Reg. 27486 (June 29, 1989). The Rule requires all public water supply systems supplied by unfiltered surface water sources, such as the City's system, either to provide filtration or to meet certain objective and subjective filtration avoidance criteria and provide specified treatment techniques. See 40 C.F.R. § 141.71. The SWTR's purpose is to provide protection "against the potential adverse health effects of exposure to Giardia lamblia, viruses, Legionella, and heterotrophic bacteria, as well as many other pathogenic organisms" found in surface

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[3] "Pet. App." refers to the Appendix annexed to the Petition for a Writ of Certiorari.

water. 52 Fed. Reg. 42178 (Nov. 3, 1987); see also 54 Fed. Reg. 27486, 27488 (June 29, 1989).

One of the Rule's filtration avoidance criteria requires a public water system to maintain a "watershed control program" that minimizes the potential for microbiological contamination. 40 C.F.R. § 141.71(b)(2) ("The public water system must maintain a watershed control program which minimizes the potential for contamination by Giardia lamblia cysts and viruses in source water."). The watershed control program is to be evaluated based on its adequacy in achieving this goal, considered in light of several factors, which include "the comprehensiveness of the watershed review; the effectiveness of the system's program to monitor and control detrimental activities occurring in the watershed; and the extent to which the water system has maximized land ownership and/or controlled land use within the watershed." Id. The regulations also set out the "minimum" requirements for a watershed control program: "(i) Characterize the watershed hydrology and land ownership; (ii) Identify watershed characteristics and activities which may have an adverse effect on source water quality; and (iii) Monitor the occurrence of activities which may have an adverse effect on source water quality." Id. Thus, the regulations focus on the program's effectiveness in minimizing contamination, and do not dictate the ways in which this should be accomplished.

Petitioners, relying on a single excerpt from the filtration avoidance regulations, erroneously argued below that a successful watershed control program can only be achieved through land ownership and/or agreements with all individual landowners within the watershed. That provision states, "The public water system must demonstrate through ownership and/or written agreements with

landowners within the watershed that it can control all human activities which may have an adverse impact on the microbiological quality of the source water." 40 C.F.R. § 141.71(b)(2). Petitioners' narrow reading of the regulatory language, in isolation from the rest of the filtration avoidance regulations, ignores the SWTR's focus on the practical effectiveness of watershed control programs. The regulations, read as a whole, make clear that qualifying for filtration avoidance depends on having a program that is demonstrably effective in minimizing the potential for microbiological contamination in the source water, through a program that controls land use within the watershed, as the City's program does. EPA employed this view of the regulations in approving the FAD, and this interpretation of the SWTR is entitled to considerable deference. See Auer, 519 U.S. at 461.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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